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'Trapped by Tradition'

WOMEN & GIRLS in DETENTION in KABUL WELAYAT

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I. INTRODUCTION

Context of the study

medica mondiale's main concerns are women's recovery from trauma in war, and women's rights. We have repeatedly observed that, after conflicts, traumatized women exhibit psychological problems in proportion to the amount of compassion shown them by their family and community. In other words, traumatized women who get understanding are more likely to recover. Sympathy however varies, for people make judgements about the type of violence experienced, who did it (e.g. in many eyes, enemy soldier rapist is not the same as liberating soldier rapist) and how it changed women's status (e.g. from wives to widows, from virgins to rape 'victims'). Unsympathetic attitudes often then resonate with inequalities contained in written law – particularly regarding custody of children, divorce, remarriage, and ownership of property. It is for this reason that our psychologists usually work in close collaboration with lawyers.

medica mondiale began a modest program of capacity building for female psychologists and doctors in Kabul hospitals in spring 2002, at that time we also began work on women's rights. As part of this we spearheaded getting female legal professionals out of their offices in the Ministry of Women's Affairs and into contact with some of the women who most visibly need urgent legal support – the women already in detention. Most of these women are imprisoned because of alleged sex offences: most commonly running away from home, or adultery.

Initial focus was on interviewing the female detainees to highlight problems so that the Ministry of Women's Affairs' Lawyers would assist. However, we soon realised that detainees needed other things; we brought our medical staff to examine them, and we brought material aid. It then became apparent that the international media was fascinated by the issue of women in jail in Kabul. How, they asked, could a country that has signed human rights conventions still be putting women and girls in jail for simply having sex outside of marriage, or running away from home? Surely, the journalists suggested, the Afghan Administration should uphold progressive written laws and repudiate traditions previously used by the Taliban to jail poor young people from troubled families. Surely financial and political commitment is available from the international community to ensure that women's rights can be respected.

A great many journalists and others without a legal background have visited the women's prison, seeking the detainees 'human interest' stories; and it is largely in response to their interest that this report was compiled. We hope that by detailing many of the cases, this report might stimulate improvements in the ways all cases are handled so that those who particularly lack recourse to justice namely women and the poor can receive more equitable and fair treatment.

Morality and incarceration

There are few women detained in Kabul Welayat (Kabul Provincial Administration) for serious criminal activity. Most women are detained not for violations of the Criminal Code, but for transgressing customary laws according to Sharia (religious codes). Sharia includes concern with the regulation of behaviour considered by European law to be private and outside the scope of legal oversight. Particularly regarding sexual conduct, Sharia seems to regard the public order, rather than the individual as the victim to be protected e.g. the Medical Jurisprudence Department uses a criminology chart of 'sexual perversions and sexual crimes' which subdivides rape into 'forced sex' and 'sex with consent'. The latter kind of 'rape' applies to sex outside of a legally recognised relationship.

Female detainees repeatedly articulate a belief that they are trapped because of attitudes of family members, rather than as a consequence of careful enquiry with impartial legal representation. The women say that their imprisonment is 'all about money and power' and, in the words of the longest-incarcerated female prisoner 'There is justice for none.' Others including some in positions of responsibility also express similar opinions: the Head of Investigators at the Welayat told 'The women in prison are not criminals. What matters is that the people *think* they are criminals.'

Investigators and prosecutors see their role as negotiating between a family's sense of right and wrong and the fate of the individuals concerned, rather than in rigidly applying a written code. It is these traditional definitions of correct moral behaviour that continue to trap women (and to a lesser extent men) and restrict their life choices. And for the particularly unfortunate few, these traditions lead to and justify their detention by the State. Imprisonment on such grounds violates the spirit and the word of many international human rights treaties signed by Afghanistan including CEDAW (the Convention on the Elimination of Discrimination Against Women) and the Convention on the Rights of the Child. As such the detention of the women and girls in Kabul Welayat reveals classic unresolved conflicts between tradition and modernity. It highlights that at present in Afghanistan, there is no consensus and little will to resolve this tension in order to promote human rights, particularly where women's rights are in question.

Methodology

This paper is informed by the author's visits to the female detainees from March 2002 to February 2003. During the course of more than two dozen visits, she was able to talk with women and find out their understanding of their situations. Gradually a picture of common patterns emerged, both in the women's situations and in the ways in which they gave voice to their fates. In the interests of brevity only the cases of women who were in detention between 5 and 8 February 2003 are written up here, but many other women have been interviewed, including some after they were released from the detention center. On average each woman whose case is detailed here, gave her story over the course of one hour, in some cases the woman talked on multiple occasions lasting in total up to four hours. In many cases we talked with the same women again and again and gradually clarified apparent ambiguities or contradictions. Other prisoners and guards who were present often gave us opinions, such as comments that a woman was innocent or another was lying. In 2003 access to prisoners and discussion without the presence of guards became more frequent. Details of the EU representatives interviews with the same detainees are also presented for comparison.

Every effort was made to ensure that these discussions were clearly understood as interviews to gather information for use in the public domain, not to be confused with counselling

sessions, which are undertaken by medica mondiale psychologists, in the Welayat according to regular standards of confidentiality and privacy.

The author also spoke frequently with Guards, with Investigators and with the Chief of Security for Kabul who is responsible for the jail. From January 2003 the author began to make interviews with other legal professionals on a more systematic basis and began to interview women not for activist reasons as before, but specifically in order to be able to detail how cases of some women were handled and understood. In this way three Investigators, three Prosecutors, a Deputy of the Lord Chief Justice, a District Court Judge and members of the Medical Jurisprudence Department were interviewed.

As such this report bears all the faults of being a preliminary document, written by a women's rights activist rather than by a Sharia expert, using only a selection of cases and with less than thorough research methods (the interviews with officials and access to files lasted less than five days). The hope is that it can provide a firmer starting point for those in the international community wishing to address the problems. Any comments and improvements will be received with great appreciation and can be sent to: medicamondiale@les-raisting.de

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II. WOMEN & GIRLS IN DETENTION IN KABUL WELAYAT

General conditions in the female detention center

Women and girls are held in a wing of a dilapidated building that encloses an inner area where there is a yard and a small building used by guards particularly in the summer. Two sides of the wing are more or less uninhabitable and unused. The side which is used contains one room used by guards and visitors and it usually has a few choice detainees sitting around, then a room for toilet and washing (a hole in the ground), two medium sized rooms (which could hold five single beds along all walls) and one small one (which barely holds two beds). There is also a room which has a blackboard, which is used sometimes for literacy teaching and sometimes to hold prisoners. The floor and walls are all hard stone and are in bad condition. When it is rainy the uneven floor is covered with puddles of water. The roofs in most rooms look in imminent danger of collapse. There is electricity a lot of the time, and heaters have been provided by medica mondiale. They are used when the current is strong enough but as there are no sockets, they are connected by bare wires to taken apart switch sections in the walls. There is a water pump in the yard which was replaced in late 2002 by German ISAF, after approximately 6 months of being broken. Washing is hung outside in the yard. According to General Abdul Baseer Salangi, the Head of Security for Kabul, about 2000 US$ is needed to renovate the buildings. The poor conditions are well known due to international visitors. So far most improvements such as beds, clothes, and blankets have

come from private donations, only half a dozen foam mattresses appear to have come from institutional sources.

Prisoners move fairly freely in and out of the rooms and the yard. At night a main inner door is locked in addition to the outside door. There are reports that at night the toilet area is also locked. Food is provided out of police/military rations, and there are extended periods when none is available. Prisoners who have sympathetic families nearby have food brought to them. Families are not allowed inside the building but have access, subject to the guards approval, to prisoners through a hole in the main door during mornings. By contrast media crews and other international visitors are usually let in easily to visit the detainees.

The prison guards

There are approximately 16 female staff of the Interior Ministry who act as prison guards taking shifts in guarding female detainees in the Welayat. They are not exclusively assigned to this task and also perform duties such as checking women entering the Welayat compound, and checking women attending conferences and meetings in other parts of the city. Some of these women have been working in the Interior Ministry for a long time i.e. the chief guard who has recently been promoted to an office job in hiring and promoting staff, was guard before and during the Taliban era. After 15.00-16.00 hours night guards take over, and from this time there are usually just two women in charge of protection and security for all female detainees. Guards bring their children to work with them, and also appear sometimes to bring their female friends. Many of the female guards are widows and appear to be regarded in low esteem including by the Chief of Security for Kabul.

The guards have extensive and constant contact with female detainees, and this creates the appearance of a relaxed and friendly environment. A few of the detainees usually sit with the guards, and they act on the guards behalf to control the other women. Some of the guards have been observed displaying compassionate behaviour, for example one guard took off manacles against instructions, when one woman became extremely upset at being cuffed. Guards bring their laundry to the prison for prisoners to wash and iron for them. When interviewed alone, detainees have told of violence, intimidation and extortion by guards. On one occasion medica mondiale witnessed a guard slapping a prisoner around the head. There are rumours that guards allow men access to the women for sexual purposes. There are also rumours that release from jail is ‘bought’ in various ways.

The guards control access to the prisoners, and currently, due to foreign visitors, who give money or aid to the prisoners, are in a position to run quite a profitable business. It does appear that guards appropriate gifts of goods or money back from prisoners after visitors have left. For example blankets delivered to the prison almost always disappear, with guards claiming that the prisoners send them home to their families. Prisoners dispute this.

Guards also determine whether women should have access to medical attention or not. One detainee who had severely swollen ankles and could not stand up, was denied care by the head guard on the grounds that ‘she is guilty. She hurt her ankles evading police, and therefore doesn’t deserve care.’ There is a male prison doctor who appears to get called only in cases of obvious emergency. In the past year there have also been a few visits by doctors from the NGO ‘Emergency’. Women who are about to give birth, need pregnancy tests or intercourse/virginity exams are taken to Malalai Maternity Hospital. Medical problems faced by women in detention in the last year have included: dysentery, chicken pox (named by

guards as 'small pox'), gynaecological problems, pregnancy problems, as well as depression, suicidal thoughts and apathy. medica mondiale makes every effort to bring in Afghan doctors to examine women, has a psychologist who began providing group and individual work in 2003, and has on occasion secured permission to take women out for check ups. medica mondiale has also acted as 'Mahram' (guardian) in order to ensure release of prisoners, as women even after formal release have to be handed over to a male relative/guardian. In two cases women who stated they had no safe place to go after release, were taken to a women's shelter in Kabul.

The media has a crucial role in informing the public in Afghanistan and abroad about human rights issues in Afghanistan, particularly regarding possible miscarriages of justice. However the current high level of interest by outsiders appears to be producing negative effects on the women and risks turning the female quarters into a kind of spectacle. Intense questioning by visitors about the reason for incarceration is enforcing a sense among women that they really are guilty of something, and reinforcing an already prevalent sense of shame regarding the sex involved in most cases. Detainees sometimes appear very disturbed after such visits, possibly due to the fact that many journalists and camera crews are male, and most prisoners have had limited contact with men outside their family, and certainly have never discussed sex, rape or abuse before publicly. Access to male detainees does not appear to be requested by most media, and it does not appear to be so easy to gain, even Amnesty International researchers had problems getting access.

Prisoners/detainees

Detainees include women and girls whose cases are at all levels of processing (under first level investigation, at appeal, and after final sentencing), as well as some who are witnesses or victims. Ages are difficult to ascertain, as many Afghans do not know their birth date. In the past year most are women detained have been in their twenties, the youngest reported to be 11 years old, the oldest approximately 70 years. Usually there are some young children with their mothers and also some babies. Usually there are some women who are pregnant. The number of women who have been detained at one time since March 2002 has been never more than 35.On 6 February 2003, there were 16 female prisoners ranging in age from 13 years (disputed by investigators who claim she is 16 years old) to 40 something. One detainee is pregnant. There were three babies under two months old.

Mostly women and girls are incarcerated in connection with moral crimes of adultery, sex before marriage, illegal marriages (sometimes technically bigamy, more often than not one of the marriages are not formally legal). There have been up to 4 alleged murderers at one time since 2002. More rarely there have been some women (maybe only one in the past year) imprisoned in connection with 'professional' prostitution, and sometimes women held for theft or kidnapping (maybe six in the last year). Guards and other prisoners have clear opinions and judgements on most cases, and do not hesitate to tell them, usually out of ear-shot of the alleged criminal.

In some cases including of alleged murder and in some kidnapping cases, other women somehow connected including those who might just be classified as accessories or witnesses, have been incarcerated, whilst initial interrogation takes place e.g. recently a girl who was sold into prostitution was detained alongside the two women who are alleged to have sold her. In two cases in the past year women judged by the guards to be completely innocent were said

to be housed in the jail after becoming 'lost'. Whether this was an initial pick up on alleged prostitution has not be clarified.

According to European legal standards the vast majority of females incarcerated in Kabul are not guilty of having committed any crime. Of those crimes also defined in Europe as such, including murder and kidnappings, most cases could be demolished on technicalities particularly - reliability of statements by the accused extracted under duress, procedural irregularities, interpretation of insufficient and unreliable medical evidence, interference with witnesses and accused by prison officials, use of second hand evidence.

It is unusual for those who are incarcerated to have had much education. In early 2003 there was one teacher who spoke a few words of English, and another women who had finished twelfth grade. There are literacy courses for women in the prison, but few have the heart to try and learn. The courses appear to be optional, only for under 18s and barely attended. It is not clear if the literacy also involves some element of moral reform or not. One prisoner said 'Its just how to write Allah'. There are no other activities or occupation for detainees except washing and ironing the guards' clothes, cleaning their rooms, talking with each other, playing with detainee or guards' children. medica mondiale cannot remember seeing a radio, and prisoners are rebuked if they request to borrow visitors pens or mobile phones. This is not the same in other female detainee centers in other parts of Afghanistan, for example in one city prison women sew, knit and have day long visits from relatives. In others the men do bead-work, make mirrors and do painting. Women in Kabul Welayat would like to be more occupied and have requested sewing machines, and items for hand sewing or embroidery.

The family backgrounds of the women in the prison are clearly troubled, the guards say that at least 50% of the inmates come from violent families. Most tales are twisted and involve multiple abuses by many family members: detainees tell of forced marriages much against their will, their mother marrying them to one man and then another, their father refusing to accept their adamant rejection of marriage partners, of finding a way out of abuse by running to another male for help, and then ending up with that man in an equally unhappy relationship. Some have clearly been so unfortunate that they get caught at every stage of running away, others have been taken to jail by mothers or fathers who discovered them after years of living in other towns. This unfortunately is a pattern for many if not most Afghan women outside of the criminal justice system. So, all women detained are inevitably those with either in-laws or families who want them in prison – in cases of adultery their husbands, in cases of running away their or the boy's family. If the families agree a settlement in these cases (marriage, financial compensation) they do not get to incarceration stage. So some women are detained whilst their families and the victim/boys family argue about who gets what in exchange for the woman's 'honour'. In cases of 'running away' (and this almost always includes sex outside of legally contracted marriage) the male is usually also held. But the male almost always gets out of prison first. He then, if he cares for the woman, tries and gets her released. If he doesn't care she has to rely on others - family members, or lawyers from the Ministry for Women's Affairs who go in periodically and generally refuse to touch cases they consider ambiguous from a moral standpoint.

On two national holidays in the last year 'amnesties' have been declared and women have been released according to advice of investigators. The prisoners are convinced that the releases were connected to bribes. The ability of the prison guards to influence individual releases is not clear but it is clear that some try to intervene or speak up for individual prisoners in their dealings with investigators. These amnesties appear to be the key way the system deals with complaints from foreigners about incarceration of women and girls.

However, as mentioned above, most of the detainees come from abusive families, and releasing them needs to be done with careful consideration of the safety of their home environment. One former detainee who was released after the Amnesty of November 2002 was later killed by her family (and no one has been arrested in connection with her murder). In response to this tragedy prison guards claim that there will be stricter control during future amnesties.

List of female prisoners/detainees in Kabul Welayat on 5 February 2003

16 women, three young babies (between 30 and 70 days old), and six children. All ages are approximate as few Afghans know their year of birth. All dates of incarceration are also approximate.

'A' Held since January 2003. Claims age is 13 years, contested to be 16 years. Initially charged with running away, no sentence. Case closed. District 6.

'B' Held since January 2003. 36 years, no sentence, charge of running away/adultery (released on 7.2.2003).

'C' Held since January 2003. 19-20 years, no sentence, charge of running away/adultery.

'D' Held since July 2002. 20-22 years, sentence of 5 years for running away/adultery.

'E' Held since May 2002. 22 years, sentence of 6 years for adultery.

'F' Held since April 2002. 17-19 years, sentence of 15 years for incest, under appeal.

'G' 29 years, charge of murder, under investigation. District 10.

'H' Held since late December 2002. 20 years, 3 months pregnant, charge of adultery/running away.

'I' Held since December 2002. Plus two sons, 27 years. First level investigation, no sentence, charged with running away/adultery. District 2.

'J' Held since June 2002. Plus baby, 22-25 years, sentenced to 8 years for running away/adultery.

'K' Held since May 2002. Plus baby, 20-26 years, sentenced to 5 years for running away/adultery/illegitimate child. 2nd level, will not appeal. District 11.

'L' Held since July 2002. 18 years, sentenced to 4 years, for running away/adultery/escaping from prison.

'M' Held since February 2002. Plus daughter, 40 years, sentenced to 7 years, for kidnapping, armed theft and pimping.

‘N’ Plus son, 25 years, sentence of 3 years for prostitution/adultery. Final verdict. 10th district.

‘O’ Held since July 2002. Plus two children, 31 years, sentence of 15 years for murder.

‘P’ Held since April 2002. Plus baby, 25-30 years, sentence of 6 years for running away/adultery. 1st level.

Update: 3 additional detainees on 8.2.2003. Two for alleged selling of a girl into prostitution 9.5 years ago, plus the young woman herself – ‘Q’. All related by marriage. Charge should also include rape by the uncle before the sale. All later released within two weeks due to ‘out of court’ settlement.

DETAILS OF CASES OF FEMALE PRISONERS/DETAINEES

‘A’

Her version of story according to Police Investigators, Ms Wadjia and Mr Rauf

The accused is 16 years old from a family whose origins are in Ghazni, 20 days ago she went to a wedding party (in Kabul) and a friend Freba offered to take her to Freba’s sisters house and then to go to ‘As’ house. Instead Freba kept her for 20 days locked up and guarded in various locations (two or three places over this period of time, moving her at night so she would not understand where she was) and said she would get her married. After 20 days they went out to buy clothes for ‘A’ for marriage, neighbours saw them shopping and informed her family who later took her to the police.

One investigator thinks that Freba intended to sell ‘A’, and he does not think she was harmed in any way. On further questioning both the investigators admitted the possibility that she could have been raped, and they stated that Freba had threatened ‘A’ with death. For this reason the investigators admitted the likelihood that ‘A’ would not give them details of what actually happened during her captivity.

‘A’ identified three men from Ghazni who Freba told her she should go with. She says that Freba took money from the men in exchange for her. Freba told her that she was being forced to do this. The three men, ‘A’ and her family were questioned in relation to this case. Freba disappeared to Pakistan after the arrest of ‘A’, and cannot be traced. Requests for detention of Freba were circulated through ‘usual official channels’. The men were released as it was decided by investigators according to their testimony that Freba was not in a good relations with them and so ‘A’s opinion about them would be biased also.

Two medical exams have been performed, one to ascertain sexual relations, and one to ascertain age. The Medical Jurisprudence Dept claim that ‘A’ is between 17 and 19 years old. Malalai hospital did the virginity test, and it was determined that the hymen is not intact, and was broken several years ago. ‘A’s’ family claim this is due to a fall from a horse, and this is accepted. The investigators see no reason to sentence ‘A’, as she cannot be charged with running away ‘as there was no man involved’.

Her version told to EU, 26.1.2003

'A' is 13 years of age and seemingly the youngest. We met her father outside the prison. He was visiting her twice a week and tried to do what was possible to get her released. 'A' has been in prison for 15 days. She attended a wedding and was taken outside by a girl that she knew of approximately 18. She was forced into a car and driven to a house, where she was intoxicated and raped by a man, whom she did not know. She was reportedly kept in a house for twenty days and subsequently raped by many different men. Finally a neighbour got to know of her whereabouts and succeeded in freeing her. Her father went to report the crime to the police, after which she was imprisoned. It all happened in Ghazni. While we were in prison 'A' was taken for a 'virginity test'. 'A' cried a lot but seemed otherwise fairly stable, taking into account what she had been through.

Commentary

There appears to have been insufficient investigation: no-one at the wedding party appears to have been questioned. The words of the three men against the unquestioned Freba have carried weight, whereas 'A's' words are not being trusted. 'A' comes from a very poor family, and says that her family want her out of prison so she can continue to earn money for them through making carpets. The author suspects the family of being in some way involved with the kidnapping or sale of 'A'.

'C'

Her version told to EU, 26.1.2003

'C' is 19 years old. She married at the age of 15. The husband's house was not a good one. The mother-in-law was a bad lady who committed adultery and other bad things. The husband told her to do what the mother-in-law did (comment: we understood this as prostitution). 'C' fled to her father's house but he could not protect her. The elders wanted her to move back to the husband and finally she was taken there by a brother-in-law. She later fled to Pakistan and worked there as a house servant. When the employer left for Haj, she returned to Afghanistan to seek her father. She went to the police to have news about her father and was then arrested and brought to jail. This is 11 days ago. Her case is under investigation.

'D'

Her version told to medica mondiale, 24.7.2002, 28.9.2002

Her brother-in-law came in one day and told her she was divorced. He showed her a paper but she could not read it. She demanded to see her husband but was denied this possibility. She was then taken to her aunt, and married to a second man from Bamiyan. This turned out to be a fake marriage, and the next day he disappeared. The brother-in-law escaped. Her husband is now bringing charges against her for adultery/bigamy.

Her version told to EU, 26.1.2003

'D' had been married 3 months when she went for an ordinary visit to her aunt's house. The aunt brought a man into the house and forced her to 'marry' him. She was kept in the house for a period. Her husband went to the police to find out about her whereabouts. She was called to the police, brought in front of the court and sentenced to 5 years in jail for illegal marriage.

'E'

Her version told to medica mondiale, 29.9.2002

Her constantly abusive husband kicked her out of home, so she spent a night at an uncle's house. He now is accusing her of adultery. 'I am sure my husband gave money to the court to have me sentenced.' The Ministry of Women's Affairs Lawyers say there is nothing they can do to assist in this case.

Her version told to EU, 26.1.2003

'E' is jail because of her husband's accusations that she ran away from home. She was in prison in November, during Ramadan, when President Karzai pardoned a number of female prisoners. She cannot understand who was released at that time and who was not and believed that money and power were involved. She insisted that she wanted to see the decree where President Karzai released a number of women. 'E' said that she was taken to court to sign the decision of the court of six judges, but had no possibility to tell her version of the story.

'F'

Version according to Court Investigator, Mr Said Munir

She had sex with her half-brother, got pregnant and was taken to Malalai Maternity Hospital in Kabul by him for the birth. Later on, he tried to give the child away to a woman, who then enquired about the mother. He told her it is his child, and the mother is in hospital (as she was at the time). This woman suspected something, and decided the parents were related closely, so she informed the police, who then arrested both children.

Initially both confessed to the police that they had sexual relations, and that he had told the woman who was to 'adopt' the baby that he was the father. If there was evidence of rape then the charges would be different but there is no suggestion of this. After initial confessions the parties were asked if they knew the criminal nature of such incest, and then they began to deny having had sexual relations with each other. The man and baby were sent to the Medical Jurisprudence Department of the Ministry of Public Health for paternity tests to take place. But the Department apologised that they do not the technology to do this. The Court Investigators do not think they can find the man she is now claiming is the father as he is allegedly in Pakistan.

Her version told to medica mondiale, 29.9.2002

She is 17 years old. She has been in prison for approximately 5 months. Her half-brother is in prison also in connection with the same case. Sentence is 15 years for incest. She told that she had a relationship with a boy in Pakistan who she wished to marry. She became pregnant by him and hid it from her family. She returned to Kabul. Her half-brother (also 17 years old) was with her when she had labour pains and took her to Malalai hospital for the delivery. Whilst in the hospital he was seen by the police trying to give the child away. He then tried to protect his half-sister by claiming he was the father, but was not believed and so he was arrested.

Her version told to EU, 26.1.2003

'F' is 17 years old. She loved a man but her father did not approve his proposal to marry. The two youngsters escaped together. She had been through a trial in Kabul court. She got a verdict of 4 years imprisonment of which she has served 8 months now.

Comments on case from Welayat Prosecutors

The penalties in this case depend on whether the parties involved and in particular the women can be proven to be under 18 years old, and therefore not legally adults. However, the

Medical Jurisprudence Dept has proven that the woman is 19 years old. When medica mondiale questioned what kind of medical proof could be used to determine age, no answer was forthcoming.

Status of case

15 years as first level sentence. The case is being appealed and is now therefore taken to the 2nd level who have judged that the sentence is not fair, due to the fact that both parties denied the charges in court. It is now back to the 1st level for further investigations. The Court decides whether or not to offer plaintiffs a lawyer, currently the parties do not have such legal representation.

Commentary

This case could be proven by a simple DNA test, but there are no funds to send hair samples to another country for analysis. The international community could assist in this by locating a laboratory and ensuring that samples get sent for analysis.

Officially the child should be ward of the state. In one discussion the prison guard told medica mondiale translator to tell internationals the falsehood that the baby is dead. There is also some confusion within the Prosecutors office where the baby now is – the head claimed not to know.

'G'

Her version told to medica mondiale, 1.2003

Her cousin raped her when her son went out to buy tomatoes, the cousin then fled. His family were initially apologetic and wanted to resolve the case by giving some sheep and other goods as compensation. His father admitted that his son had been guilty of such an act and was initially very ashamed. However, the man returned, and she feared he would attack her again, so she threw oil in his face – as she wanted to 'mark him' in return for what he did to her. Her mother was present at the time. He received burns which she does not think were sufficient to kill him. He died after being taken to hospital. After this his father accused her of murder, and wishes for her to have the death penalty. She reckons she could pay her way out of prison but given the crime would need thousands of dollars to do it. She has a child who is in school, and for that reason she left him with her mother so he can continue education.

Her version told to EU, 26.1.2003

'G' complains about headaches and kidney problems. First, she claims she has not gotten any medicine but has seen a doctor. She says she has gotten a prescription but has no money to buy the medicine. Later she shows us the medicine which apparently is anti-biotic and something else. From a layman's point of view the medicine seems adequate. 'G' has been a widow for 10 years. She admits having killed her cousin who raped her once and then tried a second time. She burnt him with oil. She has a ten year old child who lives with the grandmother. No decision has been taken in her case.

Court Investigator version

'G's actions are considered to be pre-meditated, rather than legitimate self-defence, as she 'planned' to kill her rapist. If she had immediately killed him during the act of rape the Court would be able to look more sympathetically on her actions.

District Court Head's comments

This case is receiving a lot of media interest! The sentence would be reduced if a settlement was reached between the two families. This could mean exchange of goods or of a female member from the accused women's family to the murdered man's family. Even such an exchange of a woman to 'pay the debt' as 'bad', would be considered acceptable by the District Court as long as there was no sign that the girl used in payment was 'forced.'

Commentary

Hospitals in Kabul are insufficiently staffed with expert doctors and nurses, and so there are occasions when even routine procedures have resulted in death. The Commission which is part of the Medical Jurisprudence Department which deals with medical negligence has not met since the fall of the Taliban, due to lack of expertise in forensics and lack of resources to prove or disprove medical cases. It is possible to ask the Ministry of Public Health to review the case files on this death to see if there is any clear evidence of medical negligence. However, it is not hopeful that they would be willing to interpret medical evidence to accuse their own staff. medica mondiale has insisted on a review to the Minister of Health in two previous occasions and is not satisfied with the medical explanations for the deaths.

There is gossip in Kabul that the sex between 'G' and the murdered man was consensual and that her attack on him was intended to prevent the family knowing of their relationship. This reflects common attitudes generally that women declaring rape are lying.

'I'

Her version of story according to Court Investigator, Mr Sayed Portsha

She was married 8 years ago, and had one child by her husband who then died. This child is now with his family. She then was married 6 years ago, to a cousin, by the force of her mother and brother. She was locked in a separate room from the groom, and did not see the Mullah or have a witness with her. She did know that a ceremony was going on by which she was being married. She escaped from this relationship and lived with her mother in Kabul. During this time she had no relationships with other men. Her mother then arranged a third marriage. She was taken to Pakistan with the man and engaged there. Then her brother, her and her husband came back to Kabul. She lived with her 3rd husband and mother in Kabul and in Mazar and Iran. She has two children by the 3rd husband.

(summary – woman said that she was forced to marry in her 2nd and 3rd marriages).

Her version told to EU 26.1.2003

She had been through an engagement ceremony ten years ago. Unaware of that fact, she later married another man with whom she had two sons (i.e. 3rd husband). She had been in jail 10 days (on 26.1.2003) accused by the earlier 'fiance' (with whom she had never lived) of 'illegal marriage'. Also her husband and brother in law have been imprisoned.

Update: 3.2.2003: brother-in-law is released.

Version according to 2nd husband who is accuser

He says that the accused loved him, married him, and suggested they lived together in Panshir. He provided a photograph to the Court of him with her first child to show how much they were happy together. They came to Kabul together and then the Taliban arrived. But as he was Mujahedin he escaped around 5 years ago to Panshir, and she refused to go with him. Whilst he was there he heard news that she had been taken by a Talib man. He came back to

Kabul after the fall of the Taliban and sought out her 3rd husband and father-in-law. He appealed to the Court, who then ruled that the father-in-law should bring in his son (the 3rd husband). The father-in-law brought his son and daughter-in-law back to Kabul from Jalalabad. He accused the family of the 3rd husband, that she was forced into marriage with this Taliban.

(summary – 2nd husband says his marriage was legal and was not with force, but 3rd marriage was with force and was not legal).

Court Investigator version

The Court requested information from witnesses at the 2nd marriage. These told that there was no force used. The Court asked neighbours of the woman and her 2nd husband for comments on their relationship. It was confirmed by the neighbours that she was his wife, and that they were happy.

The Court took testimony from the mother of the woman in question: the woman's mother said that the daughter chose all her marriage partners, and that no force was applied. She agreed to the 2nd marriage, and with the 3rd she escaped with him under the facilitation of the Taliban to Pakistan. Instead, the mother claims that she herself was forced by the family of the 3rd husband - after 3 days of absence in Pakistan, the family of the 3rd husband called her and offered 6.5 million Afghanis to agree to the marriage. They pushed her in to a room and locked her up, they then forced her to stamp her finger on documents regarding the marriage.

(summary - mother says that the daughter chose her marriage partners in the case of 2nd and 3rd husbands)

Status of case

This is currently at the investigative level (1st level) and has not reached the Court yet. The investigation would be considered complete by the investigators when they have questioned the brother of the woman in Jalalabad. They have requested he comes forward for questioning.

Commentary

The Court Investigator sees this as a bigamy trial with the key question being whether the 2nd marriage was legal. He thinks the woman understands that you cannot be married twice. The investigator commented that most times women are alleged to be married twice, they are in fact just engaged to one of the men and married to the other, it is rarer for both marriages to be actually legally executed.

He thinks that the Court could take into account force used against the woman to marry, but claims that the fact that she didn't complain immediately acts against her. He also mentioned that she could have asked a neighbour or relative to petition the Court on her behalf if she wished to resist a forced marriage, she did not have to leave the house to do this herself. There is a question here of whether the 3rd marriage was in fact kidnapping, and therefore clearly against the will of the woman.

'J'

Her version told to EU, 26.1.2003

'J' has a baby. She married and divorced. 3 months after the divorce she remarried. She has been 8 months in prison for illegal marriage.

'K'

Her version of her story from Court Investigators, Ms Wadjia and Mr Nek Muhammed

'K' says she was married 10 years ago to a first man, but did not have a child. As a result her first husband beat her, her brother-in-law tried to rape her (or make prostitution with her), other brothers-in-law also mistreated her, and her husband did not protect her from this. They were living in Pakistan at the time. So she went with a male neighbour and when in Kabul during the Taliban time was sentenced to 5 years for bigamy. This was a result of the first husband's family putting pressure on the 2nd husband's family who informed the police. She served 6 months. She was then released and went back to Pakistan. When refugees began to return, she came back to seek out her family who are in Kabul and resolve the case.

Court Investigator commentary

Nek Muhammed does not think it is true. The first husband is older than 40 years, and he is rather simple ('not normal') and very poor. The second husband is nearer her age – possibly 28 years old. He thinks the second marriage did not take place under legal conditions, as there was no mullah and no witnesses. He also doesn't believe there was violence as she failed to contact her family when she initially returned back to Kabul from Pakistan. Additionally he claims she never told of any abuse until her arrest, and if it was true she could have told a family member or friend as 'there is always someone good in every family'. However, he does not see that the women are to blame in such cases, as most women do not have other possibilities or choices. If she ran away from family violence the law could help, but as she went with a man and had sex this puts the actions in a different light.

Prison guard commentary

'K' told prisoners that the first husband was calm and didn't beat her, but that the second was not good and didn't treat her well. The guard believes that 'K' was tricked into going with the 2nd man, when her husband was absent for a week from the house. She also claims that police do not abuse women or beat them.

Her version told to medica mondiale, on 24.7.2002 and 29.9.2002

20 years old, in prison since May 2002, sentenced to five years at first level, case appears to be of bigamy. She has not seen a lawyer in prison but did see one in court 'Maybe a lawyer did come but they didn't fight for my case.' Claims that brother-in-law tried to make prostitution with her and she escaped, went to Pakistan where she was married. She is now happy but her first husband wants money from her second husband.

Her version told to EU, 26.1.2003

'K' is the mother of a baby, delivered 40 days ago in a hospital. She was married at an age of 11 and is now 20. The husband and brothers mistreated her and the brothers-in-law did 'bad things' to her. One day she asked her husband to whom she was in fact married. Finally she left the house and went to Pakistan. After a while she returned to Kabul to seek her parents. She did not find them and decided to return to Pakistan. At the border she was arrested by the Taliban. She was subsequently released and remarried (to the father of the child). Her previous husband then reported her and she and her new husband have now been arrested.

'L'

Her version told to medica mondiale, on 24.7.2002
4 years for adultery. In prison since at least July 2002. Said she just got lost in the city. Medical examiner said she has gynaecological diseases and should have a separate toilet. Guards imply that she has been involved in prostitution.

Her version told to EU, 26.1.2003
'L' has been in the prison six months and is sentenced to 5 years imprisonment for illegal marriage. She remarried after having been divorced from the first husband. She has a child with her second husband. The first husband reported her to the police. She has been through a trial where she was allowed to speak.

'M'

Her version told to medica mondiale, April 2002
After a shoot out at a police check point in Kabul after the car she was a passenger in failed to stop, she was taken and held for at least 3 months in various police check points. This was because she was regarded as a 'political prisoner' (possibly because of the shoot out against the Interior Ministry police check point). She has had no legal representation.

'I don't have anything, and release requires money and power. The side accusing me is very powerful. So I will stay because I don't have money or power. I can't stand it anymore. I will do a suicide.'

Her version told to EU, 26.1.2003
'M'' has been in prison 13 months and yesterday she was sentenced to seven years of imprisonment after a shooting incident. 15 members of her family were also sentenced. She had not, reportedly, attended any trial but had given statements in the prison

Version according to prison officials (Court investigators, Security Chief, guards) at various times in 2002
'M'' has previous criminal record which includes possession of Heroin (during Taliban time) and another charge possibly as long ago as 20 years. She comes from a criminal family and is probably part of a large gang. 'M'' is probably the leader of this gang which posed as military officials in uniforms and guns, and went doing 'house checks' where upon they stole from the property. Part of the charge is impersonating officials, part is connected to carrying weapons, part is connected to robbery. Additionally when they were apprehended at a district police check point by police, they failed to stop and a shoot out commenced. Because of impersonation of officials the case is considered political and the Interior Ministry is involved.

Commentary
medica mondiale has been consistently told that this case is too 'hot' and too difficult and that questions are not welcome. On occasions it was intimated that there were powerful political interests behind this case. 'M'' has consistently shown evidence of depression, and on several occasions has admitted suicidal feelings. She claims to be completely set up, and that she is only in prison because she has no power and no money to bribe her way out. She consistently claims that she has not had a chance to speak out for herself or to a lawyer. The Ministry of Women's Affairs Lawyers have spoken with 'M'' on several occasions, and claimed that they cannot do anything to assist her, they wished to try and get her temporary release whilst waiting for the case to be resolved, but do not have hope this will be achieved.

Police check points regularly hold people they feel are guilty of crimes. It has not yet been possible to investigate further, but there are also rumours that individuals are held in offices and secret places around the city. There are reports from other prisoners including males interviewed by Amnesty International which allege abuse at such check points. One such report is of Jamshid, a 16 year old, held for two months with 25 other people in an office, but previous to that held for 6 months against his will and forced to 'dance' at parties, after attempted sexual abuse by a police man at this check point he killed his abuser and is now imprisoned for murder. Another report from Amnesty is the case of Shirulah, approximately 14 years old, who was sexually abused for at least two months on a regular basis, in a check point in district 11. He also killed his abuser.

'N'

Her version told to EU, 26.1.2003

'N' married her cousin. It was partly an arranged marriage and partly a love marriage. After three months of good life together, the man started to bring foreign men home and forced her to commit adultery with them. She approached the police to report this, but instead of being helped she was sentenced to 3 years in jail. Also the husband is in jail sentenced to 5 years.

Version according to Prosecutors office

She accused her husband of forcing her into prostitution. He in turn accused her father of incest with 'N' and that her hymen was broken before marriage. After review at the 2nd level the Prosecutors Office recommended a tougher sentence for the husband as they claim he is very bad and immoral. But they could not argue for a lower sentence for her, as she claims to have been prostituted over a long period of time, but she did not present herself to the police and object immediately. They believe that therefore there is insufficient evidence for her to convincingly claim force. They regret that their recommendations have not been received, and instead on appeal to third level the initial sentences (five years for the husband and three for the wife) remain. They believe this is because the final appeal is handled by men with very narrow views.

'O'

Her version told to medica mondiale, 24.7.2002, 28.9.2002 and 2.2003

'O' reported her age as 31, her husband's age as 30. She was born and raised in Kabul. She has 6 sisters and 4 brothers, none of whom has come to visit her since she was imprisoned about 8 months ago. Her mother died, her father does not visit her. She reports having had a happy childhood. She liked living at home with her family, which she did until age 20 or 22 when she married a man from Bamiyan. She never went to school, she and her husband are illiterate. She went to Bamiyan, her husband's place of origin, to marry and the couple returned to Kabul to live. She has four children ranging from 1.5 years to 13 years. The 2 oldest children live in Marestoon (Afghan Red Crescent Sanitorium). The 2 youngest live with her in the prison. She says her husband is a nice man and that she was happy living with him.

'O' and her husband rented a house in Kabul. The house had a garage that they rented to a man who was a distant relative, described as her father's uncle's grandson. After a time they didn't want the man to use the garage anymore, and they told him to leave. He became angry and threatening, saying that no one could prevent him from coming there and he was a very forceful man. He had been mistreating her for a long time. Three months after this quarrel, he returned to their house at 2 in the morning, he attacked 'O' (forced her into a room and drew a

knife, which he marked her with) and tried to rape her, an act that would be also considered incest because of the family relationship. He also attacked her husband and tried to choke him. 'O' interceded, defending her husband: and her husband threw an axe, which killed the man. 'O' was seen by neighbours burying the body in the garden and they alerted the police. She said that the man's family has connections in high places and used influence to ensure that she and her husband would receive long sentences. 'O' saw a lawyer in the prison and in court. 'O' is now sentenced to 15 years, her husband to 17. She pleads guilty on grounds of provocation

Her version told to EU, 23.1.2003
After she married, a cousin of the husband started to threaten them and wanted to 'come into her bed'. The husband finally attacked the cousin with an axe and killed him. She did not participate physically in the killing. They were both brought to trial and sentenced to 15 and 17 years of imprisonment respectively. They have 4 children. Two of them are in an orphanage and two with her in the prison. She has been 8 months in jail now. The husband, who she cannot meet, is disabled.

'P'

Her version told to medica mondiale, 9.2002
Ran away from first husband who gave her a 'sub-divorce'. After second marriage he accused her of adultery. Claims no one is dealing with the legal side of her case to help her.

Her version told to EU, 26.1.2003
'P' has the little baby delivered 28 days ago. She is in prison for illegal marriage. Her first husband took a second wife and asked her at the same time to leave the house. She did and after having lived 5 years out of the house of the husband, she remarried. Her first husband reported her for illegal marriage and she has been sentenced to 6 years imprisonment. Apart from the little baby she has with her second husband, she has two daughters with the first husband.

'Q'

Her version told to medica mondiale and UNAMA, 8.2.2003
Nine and a half years ago she was taken to live with her aunt's family who reside in Khai Khona in Kabul, as her mother had remarried and the new husband did not want children around. Her two brothers were taken to an orphanage. The aunt and her husband reassured the family that they would treat her like her own daughter. Instead the uncle raped her (she was about nine years old at the time) and then took her to Pakistan and sold her to a Pakistani man who kept her for four nights, and then sold her on to a female pimp named Farazana. The girl stayed with Farazana, in Pakistan until she managed to escape, she ran away to Kabul alone, giving her gold jewelry to the bus driver to take her. She arrived less than a week ago, and found a paternal cousin and then located her brother. She informed them of her treatment and they decided to seek legal redress. Otherwise the brother would 'kill the uncle.' During the time she was kept by Farazana she was living with other girls (usually between five and six) who were older. For the first few years she was considered too young by clients and so was not prostituted, instead she danced. After the age of 11, she began to be sold to men for sex, usually 2 a day. These included men of all nationalities – Japanese, Americans, British, Pakistanis. She became pregnant once when she was 15, but when she was four months pregnant she lost the baby after being kicked in the back and the stomach by her female owner. She was also beaten and attacked and scars from cigarette burns are still visible on her body. She has suffered severe back problems since she was prostituted, and has been taking

medicine for this, but has no obviously identifiable gynaecological problems. During her years in captivity she was drugged frequently with some unspecified medication which caused her to throw up blood after taking it. During the time in Islamabad she was in Ateyan, Pindi and Pandora Chungi but was moved around a lot. Her family is bringing the case against the aunt and her husband who sold her.

III. NOTES ON THE AFGHAN JUDICIAL AND PENAL SYSTEMS & GENDER

The Judicial System in Afghanistan has three tiers for most criminal and civil cases: the primary level district courts where most preliminary investigations take place with the involvement of police investigators, the secondary level provincial courts (in Kabul, housed in the Welayat) where appeal investigations occur (namely regarding sentencing time) and where murder and some other cases are immediately referred, and the third level Supreme Court, where final appeals are made. Murder usually goes to this third level. According to the Deputy Chief Prosecutor, there are approximately 30 Courts in Kabul including in each district.

The Prosecution Service, 'the Office of the Saranwali', is formally separate from the Judiciary. It has some responsibility for prison conditions but mostly concerns itself with compiling files on cases, for example it will go with the police and do preliminary investigations such as photographing and fingerprinting. Both the Judiciary and the Saranwali are independent from the Ministry of Justice, but in the case of relations between the latter two the Ministry disputes this independence. Relations between the Ministry of Justice and the Supreme Court are similarly strained, again possibly to do with different understandings about spheres of influence.

The process appears to be as follows: police investigate crimes and arrest suspects. Every police station has a detention facility, but the Saranwali deny that any women are kept there, instead they are taken immediately to the Kabul Welayat. "After either 24 or 72 hours (depending on which law applies) a decision about whether the suspect can be held further is made by a prosecutor from the local Saranwali office. The local prosecutor then prepares a file, with a recommendation about what crimes have been committed and what possible sentences might be and forwards this file to the district court. Certain cases including embezzlement, forgery, smuggling, murder, bigamy 'skip' the primary courts. Appeal is by right, from the primary courts except when the sentence is less than three months. A prosecutor can also initiate an appeal".

Two linked institutions covered in this paper are the Prison/Detention Center and the Medical Jurisprudence Department of the Ministry of Public Health. In Kabul, the main Court, the Detention Center, and the Prosecutors and Investigators ('Saranwali') are all housed in an area known as Welayat, which also houses the office of the Head of Security for Kabul, and some passport offices. These can be described as a sea of men, which are not easy places for any woman to wade through.

The traditional justice system comprises Shuras (or village level councils) usually made up of male elders. In some communities women also have Shuras. In the post-Taliban era these Shuras have predominantly dealt with land disputes. Additionally in many communities the Islamic clergy play a role in conflict resolution and settlement of disputes. They also perform

marriages, which are considered official if there are four (male) witnesses. These traditional systems are largely informed by the men in different tribal and ethnic groups and their understanding of what constitutes justice, according to different customs and different interpretations of Islamic Sharia law. Currently in Afghanistan, penalties are not enacted according to Sharia, so officially there are no lashings or stonings (both severe Sharia penalties for sexual offences in particular). Executions can only take place with the President's approval, but there were unconfirmed reports in 2002 of executions including of women, in Darwaz, Balakhstan province.

The interplay between custom and written law varies and is complex – depending, for example, on the individuals involved, the part of the country concerned, the specific laws broken, and the identity of the accused. Implementation of the civil codes in many areas remains problematic and patchy – in part because few people have copies of the laws. It appears that in Kabul the majority of detainees have no lawyer at any stage of the proceedings due partly to the system (in which the role of the judge is to act as neutral investigator), and also partly to lack of money. In some cases officials are reluctant to enforce certain laws because of their own practical or ideological objections. This is a persistent problem in a system in which cases and solutions frequently revolve around moral disputes rather than pre-established written legal arguments. So, for example, even though a traditional form of dispute settlement known as 'bad' – by which an accused murderer pays off the victim's family with women or girls – has been condemned and Kabul Welayat lawyers clearly state that they would prosecute such forms of settlement, some individuals questioned including the Head of one of Kabul's District Courts, say that 'as long as it does not involve force' such a payment is an acceptable way to reduce sentences and 'settle' certain disputes. Other written laws, including that a woman must be 18 before marriage, are not enforced and breaches are not prosecuted even when they involve the marriage of girls as young as nine. Even lawyers who support implementation of universal human rights standards state that they can not implement this law.

At present the whole system suffers from widespread lack of education, corruption, and the intractability of conservative elements who uphold tradition even when it is in conflict with written law. Less than 50% of the police in Afghanistan are believed to be literate and most of the Judiciary lack training in statutory law with some only having limited non-standard Madras learning. Corruption is commonly accredited to low salaries and high costs of living. Public servants receive a maximum of 50 US$ a month (this compares with salaries ranging between 200 US$-500 US$ for a driver in an INGO or UN agency), and often, including for the Kabul prison guards, even that small payment is infrequent. Taking into account these factors, some, even within the system, admit that the possibility for a fair hearing and justice for the poor and powerless is remote. These failings obviously have specific serious implications for women – who tend to articulate problems differently than the way (male) norms frame them, and who lack access to education and money as tools with which to battle sexist perceptions. The detainees the author saw claimed to suffer from lack of access to legal advice and information. In most cases they are woefully ignorant of their basic rights and even if they have vital documents such as marriage certificates are not able to ascertain their contents without assistance (a problem the vast majority of the uneducated population share).

The Supreme Court's issuance of Fatwahs

In 2003, the Lord Chief Justice Shinwari has issued a multitude of legal rulings, known as 'Fatwahs', enshrining restrictive ideas routed in traditional interpretations of Islam. For

example one ruling has been issued to ban cable television, and another has been issued to impose single-sex education nation-wide. The contents of these rulings reveals the architects to be not just conservatives but fundamentalists. The Fatwahs have shocked liberals in Kabul, who see them as giving implicit support to those with conservative ideology, and who note their rarity in former times. By contrast, in conversation, representatives of the Supreme Court claim that the Fatwahs have no legal weight and are merely recommendations which any religious figure has authority to issue. It is not clear if Shinwari can be counted as such a figure. Given the political power that legal institutions could represent, it is particularly vital to monitor the ways in which The Supreme Court and Judiciary are being used to restrict freedoms, including for women, and to watch for ways they are manipulated to constrain the possibility for progressive legislation.

The Police Force & their treatment of women

The police force is popularly believed to comprise a large percentage of illiterates, plus uncountable amounts of semi-literates and brigands (in rural areas former military factional fighters were not disarmed but merely converted to act as police). In some areas of Afghanistan, because women are forbidden to have contact with men outside their family, an accused woman's own father or brothers are currently used to arrest her. Although estimates by researchers put an appropriate number of women in a nation-wide police force between 40,000 and 70,000, there are only about 35 women in the Kabul police training school at present. Without large numbers of well-trained women in the police, most women in Kabul and elsewhere, will not be able to come forward to report crimes.

There is a great lack of confidence in the force and many people hesitate to report crimes sharing the common belief that the police, if not immediately involved in committing the crime, will at least use the opportunity to abuse, threaten and extort. The police are believed to use torture, threats or extortion in Kabul to extract confessions, and they are also known to temporarily imprison and brutalize those who come to them to report crimes. Members of the police force are alleged to be involved in crime and are abusers of men/boys currently kept in detention in Welayat, including as alleged sexual abusers in at least two cases of minors who later killed police.

The role of such an uneducated force in district level investigations can only put doubts on the chances for sensitive treatment of females in these first stages of the justice system. Even the amount of women being processed is suspect: one would expect that higher numbers of women would be processed through an capital city's penal system than the maximum of 35 seen in Kabul Welayat during any one time in 2002. But prison investigators claim that not one single female is detained in Kabul except in the Welayat. It is known that police detain individuals at check points and in district level offices sometimes for months at a time, and one prisoner currently in jail claims that she was held for three months at a district police check point in Kabul. Given accounts of corruption including from prisoners interviewed by Amnesty International one would not be surprised if closer investigation revealed routine extortion at the first level in regards to women picked up in connection, with say, prostitution, and the likelihood that these cases are simply never recorded.

The Medical Jurisprudence Department & exams for intercourse

Members of the Medical Jurisprudence Department of the Ministry of Public Health state that because of the way district level investigators and police conduct preliminary investigations 'only about 5% of all cases which require forensic or medical investigation reach the Department...All others are solved by money or power.' The Medical Jurisprudence Department is limited by this incompetence as well as by lack of facilities, supplies, resources, and training, and by threats from individuals involved in cases they investigate. At present doctors are afraid to work in this Department, and some do so only because of ultimatums threatening transfer to some remote village. Requests by the Department for ISAF protection cannot be answered positively due to the protocol that requires the official request come from the Police, and as the Department points out 'these are the ones we often want protection from.' Given these circumstances, it's not surprising that the evidence the Department presents does not hold up scientifically, and by their own admission, should have little legal weight.

This lack of reliable forensic evidence is a particular concern in crimes where a woman is accused, as they tend to be 'morality' crimes, which necessitate some kind of medical examination to determine sexual activity. Currently most if not all women who are detained undergo some kind of vaginal exam, which is either carried out by the 'only expert' in the Department (a man), or 'if the woman objects' by a female medical professional from Malalai Maternity Hospital. Such forensic evidence is then dependent on interpretation by legal professionals. In some cases, such as one of alleged incest with off-spring, simple forensics could prove the case, but are not available.

The female Court Investigators

The Investigative unit and the Prosecutors appear to be the educated, more reasonable element sandwiched in between traditional outer layers. They have power to examine appeals after first level sentencing, and they can recommend revisions in sentences. However, these recommendations can be quashed or ignored.

Cases of women detainees tend to be allocated to female investigators. This appears to be the key admission of gender differences in the system. Unfortunately, it is not the case that a female investigator will be more sympathetic or less judgemental than a man. In fact, according to the author's perception, the most sympathetic and professional investigators in the Welayat who apply their skills without bias tend to be male.

IV. GENDER BIAS IN LEGAL PROFESSIONALS' REASONING IN KABUL

Key assumptions of professionals in the legal sector regarding women and men appear to be that both sexes are equal, with equal power, knowledge, understanding and capacity to make decisions. On occasions legal professionals will admit that women generally do not know their rights and that this is in fact why they get into trouble with the law. When it comes to sentencing decisions, however, this observation is not applied, for ignorance of the law is considered to be no defence. Nevertheless, there are some cases in which ignorance of the law should be relevant. One example is cases of women who are not aware of what constitutes legal marriage or divorce. A woman who believes she is divorced and then goes and lives

with another man may well be accused and convicted of having committed adultery or bigamy.

Legal professionals also ignore the fact that women have little choice about legal or non-legal marriage. In one such case, a woman is being sentenced to adultery on the grounds that she remarried without divorce. The woman claims that she knew the second marriage was not legal, but she was prevented by the family from resisting the relationship. This coercion does not appear to have been taken into account in preliminary sentencing possibly due to the fact that she was not given the chance to give a full story, instead just had to answer interrogatory questions.

The idea that the socialisation, social realities and constraints on women and children are different to those of men seems not to have occurred to the authorities. Awareness of the gendered dimensions of power, force and control is minimal. Rather, legal decisions are dominated by moral reasoning; classifying the subjects of a case, male or female, as bad or good persons appears to be important. In Afghanistan certain behaviours are almost universally regarded as signs of a 'bad person'. In particular, having sex with a person other than the one you are legally married to is considered criminal. It is true that in such cases both the male and the female might be arrested, but it appears that as the men have more access to information, money and legal counsel, they are sooner able to secure release. The release of the woman is rarely dependent on her own resources, but on whether a male family member or the man who was charged alongside her is willing to fight to secure her release.

It is admitted by many actors in the criminal justice system that most cases are solved 'with money or power'. This means inevitably that the weak, the poor and the powerless are most likely to find themselves incarcerated. This situation – unjust on the face of it - is accepted by most prison and court officials medica mondiale interviewed, and was verbalised by one doctor in the Medical Jurisprudence Department who said 'No one with money or power is in prison.'

The following are examples of gender-biased reasonings used to explain detention or sentencing of women. All were voiced by certain Court Investigators and District Court Presidents in their discussions with medica mondiale:

1. Running away: this is considered a crime for both men and women particularly if those who ran away had sexual relations (usually classified as adultery). However, if a male runs away from home it is considered a crime only if he is a child, and even in these cases there is little tendency to bring forward a charge. medica mondiale has been told by Court Investigators when a female runs away it is considered a crime if a man is involved. Yet no Afghan woman can leave home and find a new residence, without a man to accompany and assist her. Inevitably the woman agrees to marry such a man, or to have sexual relations with him, because independent, unchaperoned living is virtually impossible, for both economic and social reasons. Consideration must be given to these facts, and full investigations into the family history of women or children charged with running away should also probe the nature and extent of violence in their original families/relationships.

2. Reliable witnesses: it appears to be a bias of investigators, and the community at large, that a women's word is not reliable. This is also an explicit part of Sharia. The tendency to discount women's explanations for crimes means that they are treated more severely than men. In cases of a man's word against a woman's, most investigators assume that the man is telling the truth, not the woman.

For example, in one case involving kidnapping and possible trafficking plus prostituting of the young woman, the three men she alleged had used her were released, whilst the young woman was detained. The men were released after they claimed that a female kidnapper (never arrested, never questioned) had told the young woman lies about them.

In other examples, the idea that defendants always tell the truth in the first level of police questioning, but then add false elements later has been frequently articulated. In particular there is a common belief that woman and girls only mention violence, rape, force, trickery when they understand that they will be charged with criminal activity particularly in cases involving sex or running away. This is understood to be an attempt to modify the charge against them, and was rarely regarded (by guards or investigators medica mondiale spoke with) as a true statement.

3. Delay in notification of crimes committed by others against a woman: there appears to be an argument that if a woman does not report alleged rape or other violence against her very near to the time of the first incidence she is lying or, at the least, cannot present an adequate defence.

For example, in one case where a husband was sentenced to five years for forcing his wife into prostitution, and the wife was sentenced to three years for prostitution, the sentence against her was explained on the grounds that she obviously didn't object that much as she never came to the police for a long period of time. This ignores the obvious power inequalities.

Certain investigators argued that there is always 'a good person in every family who could be called on to help' or 'she could tell a neighbour or friend to notify police.' The reality of many women caught in violent situations is that they have no-one sympathetic to talk to, or they fear telling. The particular difficulty and fear (when penalties could include death) for women of informing on abuses committed during the Taliban era appears to be completely overlooked.

4. Threats affecting witness or defendant confessions: court investigators told medica mondiale that a young girl never told that she had been sexually abused although this was very relevant to the case, where they failed to charge anyone in relation to her kidnapping. When asked if it might be true that she had been harmed, investigators said without hesitation, that she told them she had been threatened not to tell details of what happened.

5. Interpretation of medical or forensic evidence by Courts: there is some understanding among certain investigators that an incidence of sex cannot reliably be ascertained more than 24 hours after the event, and that the current lack of forensic supplies and equipment makes it impossible to prove the male's identity. However mistaken ideas about virginity tests (which appear to be based on evidence of an intact or broken hymen), commonly affect judgements against women.

For example in a case of rape by a relative brought by the girl, she was examined and found to have an elastic hymen. On the basis of this evidence the alleged rapist was then released. The girl was kept in detention, as the alleged rapist then brought charges against her of false accusations of rape. The logic that if rape could not be proven on these grounds neither could it be disproven, was obviously not initially accepted.

In another case, where medica mondiale holds the suspicion that the family were complicit in organising her abuse, a young girl's hymen was declared to have been broken several years

back. This evidence enabled all men connected to the case to be released. Investigators accepted the family's argument that she had broken her hymen due to a fall from a horse.

V. RECOMMENDATIONS

To the International Community:

1. Funds should be made available and an implementing agency should be selected to renovate the detention house where women and their children are currently held.
2. The rebuilding should be undertaken by a team of female builders. Mercy Corps International has already used Afghan builders to construct a woman's center in Kabul and they could be contacted.
3. If rebuilding is to be undertaken by the military (ISAF) whether female or male, the detainees and prisoners should be temporarily housed elsewhere during this time.
4. A central body should take responsibility for co-ordination of all international aid to the prisoners, and for all enquiries including by journalists (this should not be Chief of Security for Kabul).
5. Funds should be made available to ensure the adequate functioning of the Medical Jurisprudence Department.
6. An agency should be identified for training of any staff undertaking gynaecological examinations of women (i.e. 'virginity tests).
7. Up to date training in forensic medicine should be provided for the Medical Jurisprudence Department.
8. Additional resources should be made available to ensure adequate forensics, particularly regarding paternity tests, rape tests.
9. ISAF should provide protection to the Medical Jurisprudence Department in order to prevent tampering with evidence and interference with the work of doctors investigating crimes.
10. Funding should be provided to ensure Legal representation of all the accused for appeals after initial (first level) sentencing (a Legal Defence Fund).
11. The Italian government's role in supporting the development of the criminal justice system should be strengthened through the appointment of an additional partner government.
12. An independent investigation must be conducted into patterns of detention and abuse in police check points, and district offices around Kabul.

To the Afghan authorities:

1. The treatment of accused females within the police, courts and prisons should be investigated. It is recommended that a Presidential Commission is set up to analyse in

detail a selection of cases with view to making concrete suggestions on gender sensitive approaches to women accused of crime.

2. Access to prisoners by individuals, agencies and press should be controlled, and all visitors to the detention center should be required to register.
3. Release of female prisoners should only take place after an investigation into the safety of their home situation is undertaken.
4. Exact addresses and names of locations where released prisoners go back to (i.e. husbands, families) should be recorded.
5. A body should be selected to monitor the safety of women released.
6. A Legal Defence Fund should be set up to pay for representation of accused by independent lawyers.
7. The Medical Jurisprudence Department should be fully equipped to manage investigations in to deaths whilst in hospital. And in future all such deaths should be fully documented and investigated.
8. The Presidential Decree to investigate prisons outside of Kabul should be implemented.
9. All marriages and separations should be required to be registered by a central body.
10. The Prison service should be removed from under the jurisdiction of the Ministry of Interior and put under the control of the Ministry of Justice.

To the Supreme Court, Prosecutors Office and Police:

1. The use of medical experts to determine age of the accused should be discontinued.
2. In cases where there is no documentation to prove whether the defendant is legally an adult or a child, it should be ruled to treat the defendant as a child.
3. Actions should be taken to prevent Legal Bodies such as District Courts from allowing family negotiations to replace or supersede statutory law.
4. Traditional forms of settling disputes should come under the legislative code which ensures that 'tradition' can only be applied if it is in accordance with basic human rights.
5. In cases where a defendant's volition (e.g. opinions such as "she chose to run away, she chose to have sex") is in question, a qualified female psychologist should be required to give an assessment. In particular this applies to arguments over free will, use of force, choice.
6. The argument of self-defence particularly in cases of violence perpetrated against alleged murderers, rapists, attackers, should not be only understood in cases of immediate actions during attacks, but should be broaden to encompass the nature of power imbalances between men and women, and adults and children in society.
7. The international community should be formally requested to assist with forensics, protection and analysis when the Medical Jurisprudence Department cannot provide certain judgement.

VI. Further reading/reference

'Afghan Legal Reform: Challenges and Opportunities.' HPCR Policy Brief, January 2003, Harvard Program on Humanitarian Policy and Conflict Research, Conflict Prevention Initiative.

'Afghanistan: Judicial Reform and Transitional Justice.' 28 January 2003, International Crisis Group, Brussels.

'Visit to Kabul Jail, 26-1-2003' European Union Special Representative – Inger Axell

Women and Sexuality in Muslim Societies. Pinar Ilkkaracan (editor), Women for Women's Human Rights, Turkey.

VII. medica mondiale

medica mondiale's role in the issue of women in state detention in Kabul:

medica mondiale has visited the prison on numerous occasions since March 2002 sometimes once a month, often more than six times in a month. The staff have provided medical examinations, counselling, material aid and other support. Early on we brought in lawyers from the Ministry of Women's Affairs to provide legal assistance, and have encouraged them to systematise visits. We have recorded over a period of this time most detainees' testimonies. We have interviewed and questioned legal officials at all levels of the criminal justice system including Court Investigators, officials at District Level Court, Supreme Court officials. We have briefed and introduced officials from the EU, UNAMA, the Ministry of Women's Affairs and the German Embassy Kabul.

Most recently medica mondiale gained written permission from the Supreme Court to access and review all files on women currently held in Kabul Welayat. We are seeking presidential approval to set up a permanent Commission to look at the treatment of women in the Afghan legal and penal systems. This is at early stages and is being planned with advice from the Head of the Afghan Commission for Human Rights, UNAMA, and Harvard University.

medica mondiale's work in Afghanistan:

medica mondiale is a German NGO specialising in psychological, medical and legal support to women survivors of military and family violence in post-conflict regions (Bosnia, Albania, Kosova). In late 2001 we expanded our work to Afghanistan by supporting a local NGO to run the first women's shelter for widows and survivors of family violence in Kabul.

In February 2002, we began to have a field presence with the support of German Foreign Ministry funding for a Field Consultant/Lobby Worker on Women's Rights. The medica mondiale team now comprises one international, seven part-time national project staff, and six full time support staff. Our core programs focus on capacity building for the State Medical Sector and the local NGO community: we have a long-term BMZ supported Qualification Training for female medical professionals in trauma work with women, and an INVENT supported program for returning Afghan female doctors. From mid 2002, we organised courses for women in literacy and in driving funded by GTZ. From February 2003, our work includes regular assessments and consultations of female mental patients in Marestoon, female detainees in Kabul prison, and referrals of widows for psychological counselling in co-

operation with MSF and CARE international. Private support for our work in prison and for courses has particularly come from E Pond, and R Stasek.

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25 February 2003
